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## THE TREND OF RECENT CONSTITUTIONAL CHANGES

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In papers read before this Association in 1906 and 1908, and in publications<sup>1</sup> issued subsequently by the writers of those papers, the modern trend in state constitutions was quite fully presented. The detail of changes during the last three years has been so well covered in numerous publications, that a reiteration in this paper would surely be tedious and unfruitful. It may be sufficient to say that our state constitutions are constantly changing through amendment, that the powers of legislatures are undergoing further restrictions, that the executive is very slowly enlarging his powers, that the increasing mass of litigation compels an expansion of judicial organization, and that there is a growing emphasis on direct as against indirect democracy. Moreover, the states are slowly learning the art of regulating more effectively the great corporate interests under their jurisdiction; local government in county and city is in process of reorganization; taxation, public finance and the building of state-roads are important issues; and political parties begin to realize that at last their days of freedom and license are well nigh past, since they see before them, as a sort of handwriting on the wall, the direct primary, the short ballot, laws against corruption, and the voting machine in place of complaisant returning boards. Moreover our many states, diverse and widely scattered though they are, for the most part show a trend towards uniformity through the rise of the study of comparative legislation. Much of the credit for this should be attributed to the influence of such bodies as the American Bar Association, the National Civic Federation, the Conferences of Governors and the rapidly multiplying Legislative Reference Bureaus.<sup>2</sup> A national association like this, also, bringing together as it does teachers and students in political science, should ultimately prove to be not the least of the many factors in

<sup>1</sup> Dealey, *Our State Constitutions*; Dodd, *Revision and Amendment of State Constitutions*.

<sup>2</sup> For list and work of these, see *Report of the Library of Congress*, 1911, pp. 183-237.

fashioning uniform principles in state and national governments. Important as are these generalized tendencies, the writer nevertheless craves indulgence if he neglects these in detail, in order to devote special attention to what after all seems the most notable trend of late years in our states, *viz.*, the sudden leap into prominence of the electorate.

The electorate as a governmental agency has seldom been made a topic for political theorizing. We all easily admit that the voting population in a way voices the wish of the people, who under social contract theories are sovereign. Yet the social contract theory has already been decently interred and in present discussions we speak less of the sovereign people and more of the sovereignty of the state, which presumably is to secure to the people their rights and liberties. In Locke's *Essay on Government*,<sup>3</sup> liberty is to be maintained by reserving to the sovereign people the right of revolution against a government, should it perchance usurp its delegated powers. Montesquieu<sup>4</sup> would secure popular liberty by vesting governmental powers in three separate departments, each with its own special power, each checking and balancing the others, and all unified by the necessity of a common policy. Rousseau<sup>5</sup> on the other hand taught that popular liberty could only be secured by centralizing and retaining sovereignty in the whole people, and making the government a mere administrative agent under the authority of its sovereign master. We have translated Locke's right of revolution into periodic elections, at which we overturn or maintain governments at will; we have separated the three departments of government, balancing one against the other after the most approved fashion; and now the states, still unsatisfied, are placing in their constitutions a revised version of Rousseauism. For the trend of changes now under way plainly emphasizes the thought that sovereign powers should be centered in the people, as voiced by the electorate, with a plain intimation that the three historic departments of government should increasingly become administrative and ministerial in their functions.

This trend may best be shown by calling attention somewhat briefly to the rise of the electorate into its modern position of political importance. In the days of Locke and Montesquieu, although much was said about the People, so humble a body as the electorate barely

<sup>3</sup>Second Treatise, Chapter XIX.

<sup>5</sup>Social Contract, Book III.

<sup>4</sup>Spirit of Laws, Book XI.

entered into discussion, nor were its powers in fact of any real importance. Its broad democratic basis in manhood suffrage had had only a faint mention in Cromwellian times<sup>6</sup> and needed the stimulus of the revolutions of the Americas and of France to make it at all effective. But now, one hundred and thirty-five years after the Declaration of Independence, the electorates of our states with few exceptions dominate their governments. They elect practically all officials of any consequence, and by civil service rules are securing equality of opportunity for every citizen who wishes to aspire to the subordinate positions in the civil service. Furthermore the electorate through the constitutional convention and its referendum, and in some states through the initiative and the referendum in amendments, has secured control of the power of formulating fundamental law. It also is rapidly developing a direct power over statutory legislation through the same devices, so that hereafter the enacting clause of legislation is apparently to change from the old formula, "Be it enacted by the legislative assembly," to "Be it enacted by the people of the state."<sup>7</sup> In addition to these great tendencies there must be added the demand for a thorough popular control over nominations and elections, and a growing demand for the Recall, best known in its connection with the commission form of municipal government, but now prominent in the larger field through its adoption in the great state of California, and the discussion over the recall provision of the Constitution of Arizona. This new reform is in California applied to "every elective public officer of the State,"<sup>8</sup> executive, administrative, legislative, and judicial, and thus completes the logical sequence of popular supremacy. These several movements are well known in general to this audience and it is unnecessary at this time to enumerate their details.

This growth in the powers of the electorate has characterized the entire constitutional history of our states, but has become especially noteworthy since 1898, when South Dakota amended its constitution so as to provide for the optional initiative and referendum in statutory legislation. This beginning, though abortively seconded by Utah in 1900, did not really gain headway until 1902 when Oregon through its amendments gave an impetus to the movement, at the same time broadening it by the inclusion of the initiative for constitutional

<sup>6</sup> In the Agreement of the People, for instance.

<sup>7</sup> As in the Constitutions of Oregon and Oklahoma, for instance.

<sup>8</sup> California amendment, 1911.

amendments. In one form or another twelve states<sup>9</sup> have adopted these "modern improvements," and at least seven others have arranged to submit the question to their electorates for final decision. Of these states eight have also either adopted the recall or plan to submit the proposition for approval or rejection.<sup>10</sup>

The upshot of this trend within our states is that hereafter our political theorists must no longer rest satisfied with the discussion of the three historic departments of government, but must consider along with these, the fourth department of government, the electorate, which now controls the state constitution, defines therein its own organization and powers, and asserts for itself its right to elect at stated intervals all executive and administrative officers and to recall them at will; which elects the judges of the state, sits by their side as jurors in the settlement of cases, and threatens to recall them also when they prove "unreasonable" in their decisions. Through the initiative and referendum it dictates statutory legislation, recalls unsatisfactory legislators and vetoes the unpopular acts of its agent, the assembly, not with the suspensive veto of a governor, but with the absolute veto of a sovereign. Just as in England Parliament has virtually absorbed into its lower House the former haughty powers of king and nobility, so in the states the electorate is absorbing from the departments their powers, checking them when necessary, and balancing itself against them unitedly, like Homeric Zeus, when he compared his power to the combined powers of the assembled gods and terrified them into submission by threats of banishment to Tartarus.<sup>11</sup>

This discussion would not be complete unless supplemented by a study of the electorate itself, as the representative body through which the people works its sovereign will. In the first two-thirds of the nineteenth century democracy in the United States took the form of a demand for manhood suffrage, and this was finally achieved by the admission to the suffrage of the enfranchised slaves of the South. In logical order came the demand for women's suffrage, and this movement has already won within the last twenty-five years six states, which unitedly contain over five millions of population.<sup>12</sup> Many

<sup>9</sup> If Arizona and New Mexico be included.

<sup>10</sup> Adopted; Oregon, California, Arizona.

<sup>11</sup> *Iliad*, book VIII.

<sup>12</sup> Wyoming, 1889, Colorado, 1893, Utah, 1895, Idaho, 1896, Washington, 1910, California, 1911.

look with dismay at the prospect of having a voting list made up of all adult citizens over twenty-one years of age, and hesitate to favor such an extension of the suffrage, lest the troubles of our overburdened democracy be accentuated rather than diminished. Yet we must realize that if women enter definitely into economic, civic and educational activities, this in the long run inevitably spells suffrage on equal terms with men. But a compound of women's suffrage, initiative, referendum and the recall, such as that California now enjoys, might well cause to waver even the logical mind of a Rousseau or a Jefferson as he would contemplate the possibility of successfully guiding political policies through such stormy seas. One may express the hope that the rising tide of direct democracy may have its ebb as well as its flow, yet when it does move forward, no opposition is strong enough to resist its onward movement. But representative democracy has its advantages, and it is possible that if statesmen would seriously undertake the reform of the legislature, and legislative law and procedure, and also seek to redeem administration from its slough of despond, much might be done to stem the tide of direct democracy. This topic, however, comes up for discussion on tomorrow's program and needs no consideration now.

On the other hand it is not necessary to assume that an unrestricted adult suffrage is inevitable. There are tendencies in our constitutions, little noticed, that in later years may profoundly affect the whole situation by modifying considerably the character of the electorate. The natural rights theory of suffrage would assume that every male on attaining his majority should automatically become a voter. Such a system may have its utility in a simple civilization, but not in a complex one. In fact many of our states have gone far in the direction of denying it by placing numerous restrictions on the exercise of the suffrage. These restrictions in brief may be classified under four headings, and are well worth attention. (1) The privilege of voting is forbidden to the criminal, the pauper, and the mentally incompetent. If, for example, the stern provisions contained in the constitutions of Alabama<sup>13</sup> and Virginia<sup>14</sup> were common to all states and enforced, a dangerous and purchasable part of our voting population would be eliminated. (2) There are fifteen states that demand a slight educational qualification, though three of these<sup>15</sup> allow the possession of taxable property as an alternative. A disqualification for illiteracy

<sup>13</sup> Sections 177-188. <sup>14</sup> Section 23. <sup>15</sup> South Carolina, Louisiana, Alabama.

is of course especially felt in states having a large colored or foreign born population. Again, the use of the Australian ballot is itself a kind of educational qualification. In its blanket form its large size, especially in cities, is such that persons of ordinary intelligence cannot without previous study feel sure of the precise method of marking it. The process is simplified if the circle is used under party emblems, but if on the other hand the names of candidates are arranged alphabetically under each office and supervisors are by law forbidden to assist a voter in marking his sheet, a really large per cent. of voters would be unable to fill out the complete ballot. In other words the blanket ballot may disfranchise many careless or unintelligent voters, whether they live in a slum or in our best residential sections. (3) Practically all of our states require their voters to register and to vote in person but this requirement reduces the voting list by from twenty to forty per cent., varying with local conditions and the interests at stake in the election. If registration must be completed several months before election instead of within a thirty or ten day period, the number who fail to register is still larger. On the other hand states may favor a desirable class of voters by not requiring them to register for each election, virtually making them life members if other conditions are complied with. The "grandfather," "old soldier," and "old citizen" clauses of the South, or the exemption of rural voters from registration, illustrate this. (4) In some states the payment of a poll tax is a prerequisite for voting and may even have to be paid six or nine months before election. Simple though the requirement is, human nature is such that many refuse or neglect to pay the tax, and thus disfranchise themselves. This is especially the case if the payment of another's tax is made bribery, and if it is known that the state will make no attempt to collect the tax except at the time of registration. A similar result is attained by demanding prepayment of property taxes before registration. In Rhode Island, for example, only those assessed on property, real or personal, are allowed to vote for members of city councils, and personal property voters must pay in advance. The amount of property required is small, only one hundred and thirty-four dollars, but in the city of Providence the vote for members of the board of aldermen, over a period of ten years, averaged only forty per cent. of that cast for the mayor, who is voted for on the basis of manhood suffrage. In other words an apparently slight requirement reduces the vote by sixty per cent.

What is the effect of these several restrictions in respect to the

relative proportion of voters to population? In round numbers adults over twenty-one years of age should number about fifty-five or sixty per cent. of the population. If the presidential vote for 1908 be taken by states and the ratio of that vote be compared with the population according to the census of 1910, a rough approximation to the extent of restriction may be had. Making this comparison it will be found that the vote of the four women-suffrage states was about thirty per cent. of their population; twenty-five states with comparatively slight restrictions, out of their population of over sixty millions show a vote of twenty per cent.; the six New England states, using greater restrictions, cast a vote of fifteen and two-thirds per cent. out of their population of six and one-half millions; eleven of the Southern states have stringent regulations and reduce the vote of over twenty-two millions of people to a bare seven per cent., and of these the four<sup>16</sup> having the most stringent requirements vote out of their population of over seven millions only four and four-tenths per cent. The writer places no special emphasis on these per cents since there are many "extenuating circumstances," such as single party states and the direct primary. Yet the per cents call attention to a difference worthy of closer study in each state.

Without raising the question as to the wisdom or unwisdom of placing restrictions on the exercise of the suffrage, this point becomes evident. If a state desired to grant the suffrage to all adult citizens, irrespective of sex, who were intelligently interested in government, it might strike the word *male* from its constitution, make a judicious selection of restrictions as attested by the experiences of sister states and yet feel sure that its total vote would not exceed twenty or twenty-five per cent. of its population, since the indifferent, the careless, and the incompetent would disfranchise themselves. If the eleven Southern states, for example, should strike out the word *male* from their constitutions, the increase in their voting would be chiefly in the vote of whites, and yet the total would at the most hardly exceed fifteen per cent. of the population. Suffrage under such restrictions may be considered democratic, since every adult citizen male or female would have the opportunity to acquire the right to vote and only these would forfeit it who lacked energy or interest. It is probable that for many years relatively few women would wish the ballot, but those that did, and met the necessary qualifications, would have the priv-

<sup>16</sup> Mississippi, South Carolina, Louisiana, Alabama.



ilege. If by such devices intelligent women interested in civic life could be added to the electorate, and indifferent or inefficient men be dropped from it, democracy might benefit from the change. It may be true also that movements toward direct democracy would be at once safer and saner if the actual vote at an election through suitable restrictions were cast by the wiser half of our citizen body.